Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

No. 94-1868

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTH CAROLINA POWER, PETITIONER

v.

STATE OF NORTH CAROLINA *EX REL.*
UTILITIES COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether a State, in exercising its authority to set rates for retail sales of electric energy to consumers, is required by the Supremacy Clause to pass on to its consumers the full wholesale energy cost paid by a multistate utility, where that cost was set by another State, under the authority of Section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a-3.

2. Whether the State's refusal to pass on to its consumers the entire wholesale energy costs paid by a multistate utility violates the Commerce Clause.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. a. Congress enacted Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 824a-3, in response to the domestic energy crisis of the 1970s. Section 210 was designed "to encourage the development of cogeneration and small power production facilities," in order to decrease reliance on fossil fuels. *FERC*

v. *Mississippi*, 456 U.S. 742, 750 (1982).[1] Congress recognized that the reluctance of traditional electric utilities to purchase power from non-traditional facilities had been an obstacle to the development of those facilities. 456 U.S. at 750-751.

Section 210(a) of PURPA, 16 U.S.C. 824a-3(a), directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to foster the development of small power production facilities, and specifically to require electric utilities to make wholesale purchases of electric energy from qualifying facilities, or "QFs." See *FERC* v. *Mississippi*, 456 U.S. at 751. PURPA further directs FERC to promulgate rules to ensure that the rates for such wholesale purchases are "just and reasonable" to the utility's consumers and "in the public interest," and that they do not discriminate against QFs. 16 U.S.C. 824a-3(b)(1). PURPA imposes a ceiling, however, to ensure that ratepayers will not be required by federal law to subsidize purchases mandated by PURPA: No FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy," 16 U.S.C. 824a-3(b)—*i.e.*, "the cost to the electric utility of the electric energy which, but for the purchase from [a QF], such utility would generate or purchase from another source." 16 U.S.C. 824-3(d).

PURPA relies substantially on the States for its implementation. Specifically, Section 210(f)(1) requires that, "each State regulatory authority shall * * * implement" the rules adopted by FERC "for each electric utility for which it has ratemaking authority." 16 U.S.C. 824a-3(f)(1); see generally *FERC* v. *Mississippi*, 456

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[1] Cogeneration refers to the process of simultaneously producing electricity and thermal energy, such as heat or steam, usually at an industrial site. 16 U.S.C. 796(18)(A).

U.S. at 759-760; *id.* at 775 n.1 (O'Connor, J. concurring). FERC's rules establish only the basic regulatory framework, and "afford the State regulatory authorities * * * great latitude in determining the manner of implementation of the Commission's rules." 45 Fed. Reg. 12,230-12,231 (1980). "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *FERC* v. *Mississippi*, 456 U.S. at 751. Judicial review of state commissions' decisions under PURPA is generally limited to the state courts. 16 U.S.C. 824a-3(g); H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 84 (1978) ("The findings and determinations by the courts are reviewable under the substantive standards of review as established under State law.").

Congress in PURPA also recognized that federal and state utility regulations could impose financially and administratively burdensome obligations on QFs that might hinder their ability to participate in the wholesale market for electric power. PURPA Section 210(e), 16 U.S.C. 824a-3(e), thus authorizes FERC to prescribe rules exempting many cogeneration and small power facilities from state and federal regulation. That provision authorizes regulatory preemption of state law "in the traditional way." *FERC* v. *Mississippi*, 456 U.S. at 759.

b. FERC's regulations regarding prices for power purchases from QFs require utilities to buy electricity made available by QFs at the "full avoided cost." See 18 C.F.R. 292.304. FERC's full-avoided-cost rule was sustained in *American Paper Inst., Inc.* v. *American Elec. Power Service Corp.*, 461 U.S. 402, 412-418 (1983). The avoided-cost rule does not provide immediate savings to consumers, because it requires utilities to pay QFs the same rate they would otherwise pay for electric energy.

This Court held, however, that FERC reasonably placed greater emphasis on the need to maximize the incentives for development of small power production, to the long-term benefit of consumers and the Nation. *Id.* at 415-416.

Although full avoided cost is a ceiling on the wholesale price FERC may require a utility to pay a QF, until recently FERC did not state a clear position on whether States, under their own laws, can require purchases from QFs at prices exceeding the federal avoided-cost ceiling. In the preamble to FERC's regulation regarding avoided-cost rates for wholesale purchases from QFs, FERC suggested that the rates it prescribed under PURPA Section 210 were "subject to the statutory parameters," but that "the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies." 45 Fed. Reg. 12,214, 12,221 (1980). Such higher rates would "be based on State authority to establish such rates, and not on the Commission's rules." *Ibid.*; see, *e.g.*, *Consolidated Edison Co. of New York, Inc.* v. *Public Serv. Comm'n*, 472 N.E.2d 981 (N.Y. Ct. App. 1984), appeal dismissed, 470 U.S. 1075 (1985). In 1995, FERC clarified its position, partly in view of new policies in favor of competition, to hold that both PURPA and its implementing regulations bar the prescription of all QF wholesale rates that exceed avoided cost. *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, reconsid. denied, 71 FERC ¶ 61,035 (1995), appeal pending *sub nom. Niagara Mohawk Power Corp.* v. *FERC*, Nos. 95-1222 & 95-1223 (D.C. Cir. filed Apr. 21, 1995).[2]

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[2] On April 14, 1988, FERC initially ruled, prospectively, that States may not impose rates for purchases from QFs that exceed avoided cost, *Orange & Rockland Utils., Inc.*, 43 F.E.R.C. ¶ 61,067, reh'g denied, 43 F.E.R.C. ¶ 61,546 (1988). On June 16, 1988, however,

2. In December 1986, petitioner Virginia Electric and Power Company, a multistate electric utility operating in Virginia (as Virginia Power) and in North Carolina (as North Carolina Power, see Pet. ii), solicited bids from various QFs for electric generating capacity that petitioner projected it would need. That competitive bidding process had been approved by the Virginia State Corporation Commission (VSCC) as an acceptable means of complying with Section 210 of PURPA and establishing the avoided-cost price to be paid (based on the lowest acceptable bids) for QF-produced power purchased by Virginia Power. Pet. App. 167a-168a. Virginia Power employed a competitive solicitation procedure because it was receiving QF capacity offers that exceeded its projected power needs. *Id.* at 31a. The solicitation letter specified, as a benchmark for bidding, the capacity and energy charges projected for petitioner's planned gas-fired generating plant, Chesterfield Unit No. 7; petitioner received bids "right at the benchmark price." *Id.* at 73a, 141a.

FERC stayed its order pending judicial review, 43 F.E.R.C. ¶ 61,547 (1988), and the court of appeals subsequently dismissed the petitions for review, *Occidental Chem. Corp.* v. *FERC*, 869 F.2d 127, 129 (2d Cir. 1989). Because the April 14, 1988, order was prospective and was promptly stayed, it had no concrete effects. The *Orange & Rockland* proceeding has since been dismissed as moot, and the prior orders have been vacated. *Orange & Rockland Utils., Inc., et al.*, 70 F.E.R.C. ¶ 61,014, reconsid. denied, 71 F.E.R.C. ¶ 61,034 (1995), appeal pending *sub nom., Niagara Mohawk Power Corp.* v. *FERC, et al.*, N.D.N.Y. No. 95-CV-634 (filed May 11, 1995).

On June 27, 1988, FERC initiated rulemaking proceedings on the question whether it should codify the position expressed in the April 14, 1988, order. See 53 Fed. Reg. 24,099. That rulemaking was still pending when FERC ruled in 1995, in *Connecticut Light & Power Co.*, that States may not, even under their own authority, exceed the full avoided costs allowed under federal law.

Petitioner selected for negotiation ten projects from that 1986 solicitation, and, in June 1987, it contracted with seven of those projects. Pet. App. 31a. The average avoided cost of the six projects that ultimately came on line from the 1986 solicitation process for Virginia Power was $141/kW. *Id.* at 76a. One of the companies that participated in the 1986 solicitation, Ultra Cogen Systems (Ultra Cogen), submitted proposals that petitioner rejected because their price was too high. *Id.* at 31a. In 1988, petitioner again requested competitive bids from QFs, and it entered additional wholesale purchase contracts at an average price of $171/kW. *Id.* at 36a.

b. Meanwhile, after its bid responding to the 1986 solicitation was rejected, Ultra Cogen petitioned the VSCC in November 1987 for an order directing petitioner to contract with it to purchase power. Pet. App. 33a, 166a.[3] Ultra Cogen's petition specified that its proposed cogeneration project was "of critical importance" to the continued viability of a large industrial plant that had been operating in a rural Virginia community for 75 years, and to the economic health of that community. NCUC Public Staff Br. in Opp. App. 7a. Specifically, the petition stated that the cogeneration project would affect the plant's ability to continue to employ 1,200 people, and would result in an additional $60 million investment in the community. *Ibid.*[4] Faced with the VSCC arbitration, petitioner did not file

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[3] Petitioner objected on the ground that the VSCC had approved the competitive bidding process under which petitioner rejected Ultra Cogen's bids. Pet. App. 34a, 173a.

[4] A January 29, 1988, policy statement by the VSCC specified that, in evaluating specific proposals from QFs, weight should be given to economic and societal benefits to the people of the Commonwealth of Virginia, including the use of Virginia fuels, labor and other state resources, and the benefits to industries and communities associated with particular projects. Pet. App. 33a.

any papers with the North Carolina Utilities Commission, notwithstanding the fact that North Carolina retail customers comprise a fraction of petitioner's customer base. Pet. App. 35a-36a.

The VSCC appointed an arbitrator to resolve Ultra Cogen's dispute with petitioner, and the arbitrator required petitioner to purchase power from Ultra Cogen. Pet. App. 169a-183a. The arbitrator evaluated Ultra Cogen's offer by reference to petitioner's avoided costs as of November 12, 1987, the date upon which Ultra Cogen filed its arbitration petition. *Id.* at 172a. He determined that avoided costs should be calculated based on petitioner's projected costs on that date of constructing and operating its planned Chesterfield 7 plant, "since that unit is intended to be the prototype of any new capacity to be built by the Company through the mid-1990's, and perhaps beyond." *Ibid.* The arbitrator rejected petitioner's contention that the results of its 1986 or 1988 competitive solicitations, rather than the Chesterfield 7 cost projections, should furnish the appropriate measure of avoided costs. *Id.* at 34a, 173a.

On May 27, 1988, the arbitrator directed the parties to negotiate 25-year contracts obligating petitioner to purchase power from Ultra Cogen at $341.23/kW for the first 15 years of operation, and at $189.70/kW for the last ten years. Pet. App. 179a. His order did not specify how he arrived at those figures under the methodology he had outlined. *Ibid.*[5] The arbitrator approved four identical agreements consistent with those terms, *id.* at 189a, all of which were for facilities located in Virginia, Pet. 11. The arbitrator specifically commented on the "unique circum-

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[5] As noted above, the 1986 competitive solicitation, which was guided by Chesterfield 7 cost projections, yielded a price of $141/kW, and the 1988 competitive solicitation yielded a price of $171/kW.

stances of these proceedings (including that [the facilities funded by the contracts] are coal-fired cogeneration facilities in lesser populated areas of the Commonwealth)." Pet. App. 189a.

The VSCC, in a two-sentence order, ratified and adopted the Arbitrator's Order on November 18, 1988. Pet. App. 191a-193a. VSCC decisions are directly appealable to the Virginia Supreme Court, Va. Code Section 12.1-39 (1995), but petitioner did not appeal the VSCC's order.

c. In 1992, petitioner applied to the North Carolina Utilities Commission (NCUC) to increase its rates for electric service to its North Carolina retail customers. That filing was the first notice the NCUC received of the VSCC arbitration and its results. Petitioner's application sought leave to allocate to its few ratepayers that reside in North Carolina a share of the cost of its Ultra Cogen contracts, at the rate set by the Virginia arbitrator and adopted by the VSCC. Petitioner thus sought to pass on to North Carolina ratepayers approximately $2.8 million of the total annual cost of $64 million for the Ultra Cogen contracts. Pet. App. 62a.

The NCUC's Public Staff recommended that petitioner's expenses recoverable in North Carolina be reduced by $1.39 million annually, to exclude what it considered to be costs exceeding full avoided costs. The $1.39 million figure was based on the difference between the Virginia arbitrator's $341/kW avoided-cost calculation for the Ultra Cogen projects, and a figure of $171/kW, which was the average cost of power for seven QF projects, selected by the 1988 competitive bidding process, for which petitioner had contracted at the time it signed the contract with Ultra Cogen. Pet. App. 65a-66a.

On February 26, 1993, the NCUC adopted the staff recommendation. Pet. App. 24a-139a. The NCUC noted that the cost of the Ultra Cogen projects was twice the

average cost of the projects resulting from petitioner's 1988 bid solicitation process. *Id.* at 65a-66a. The NCUC determined that the costs petitioner contracted to pay Ultra Cogen were unreasonable, and that it was not bound by the VSCC's decision with regard to the Ultra Cogen projects. *Id.* at 36a. The NCUC rejected petitioner's argument that the NCUC's own rate order was preempted by the VSCC decision. *Id.* at 68a. The NCUC instead noted that PURPA and FERC's regulations permit flexibility to the States in implementation and recognize that "economic and regulatory circumstances vary from State to State." *Id.* at 67a-68a (quoting 45 Fed. Reg. 12,230-12,231 (1980)). The NCUC further ruled that its own determination of avoided cost for the Ultra Cogen projects, based on the 1988 competitive bidding procedure followed in Virginia, was consistent with PURPA and FERC regulations. Pet. App. 69a.

The NCUC also concluded that some of the high cost of the Ultra Cogen contracts appeared to be based on state law rather than PURPA. It observed that "[w]hile PURPA and the FERC regulations do not allow rates greater than avoided costs, there may be a separate basis in state law or policy for such higher rates." Pet. App. 68a. The NCUC referred to the VSCC policy statement providing that, in evaluating QF proposals, favorable weight should be given to a proposed project's economic and societal benefits to Virginia industries and communities. *Id.* at 33a, 63a. The NCUC found it "clear that the arbitrator considered economic benefits unique to the State of Virginia in setting the [Ultra Cogen] capacity payments." *Id.* at 68a. The NCUC concluded that "[t]hese benefits flow to Virginia, not to North Carolina. For this reason, it may be reasonable for Virginians to pay * * * extra costs associated with the [Ultra Cogen] projects. But it is unreasonable for North Carolinians to pay such

extra costs, and our responsibility is to set fair and reasonable rates for North Carolina." *Id.* at 74a.

The NCUC also pointed out that petitioner had violated the terms of a 1987 NCUC Order implementing PURPA in North Carolina that required utilities to submit contracts with QFs to the NCUC upon their execution. Pet. App. 35a-36a, 60a-61a. It further noted that petitioner did not appeal the VSCC order to the Virginia Supreme Court. *Id.* at 65a.

d. The North Carolina Supreme Court affirmed. Pet. App. 1a-24a. It held that the NCUC's order did not violate PURPA "to the extent it only excludes the amount *above* avoided costs," *id.* at 6a, and found that the NCUC's measure of avoided cost, based on a competitive bidding process, was not unreasonable, and therefore did not violate PURPA, *id.* at 7a-9a. The court also held that the NCUC order did not violate the Commerce Clause. *Id.* at 10a-11a. It observed that "Congress has the power under the Commerce Clause to regulate the relationships between cogenerators and electric utilities in order to protect interstate commerce." *Id.* at 10a. Because the NCUC order was authorized under PURPA and FERC's regulations and "constitutes lawful retail ratemaking," the North Carolina Supreme Court concluded that it did not violate the Commerce Clause. *Id.* at 11a. Although the court acknowledged the burden on petitioner from differing avoided-cost determinations in different States, it found that burden to be "a necessary consequence of doing business in more than one state," and noted that petitioner had "accepted the risk" of not being able to recover excessive Ultra Cogen costs in North Carolina by failing to appeal the VSCC decision. *Ibid.*

Two justices dissented. Pet. App. 14a-21a. They would have concluded that the rate set by the VSCC was binding on the NCUC's retail ratemaking decisions.

DISCUSSION

The decision of the North Carolina Supreme Court is correct, and it does not conflict with any decision of this Court or of any federal court of appeals or state court of last resort. Moreover, this case would not in any event be an appropriate vehicle for consideration of the questions petitioner presents. Petitioner's preemption theory depends on its contention that the wholesale rate set by the Virginia State Corporation Commission (VSCC) was based solely on federal law. It appears, however, that in setting that rate, the VSCC arbitrator may have relied at least in part on state law. Review therefore is not warranted.

1. Petitioner contends (Pet. 16-28) that, under PURPA, the decision of the VSCC setting a wholesale rate for petitioner's purchase of power from Ultra Cogen in Virginia has preemptive force in retail ratemaking proceedings by the North Carolina Utilities Commission (NCUC) for North Carolina residents. Congressional intent is the touchstone of preemption analysis. See, *e.g.*, *Northwest Cent. Pipeline* v. *State Corp. Comm'n*, 489 U.S. 493, 509 (1989), *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 45 (1987). Petitioner's contention is not supported by the text, structure or purposes of PURPA.

The text of PURPA does not provide that one State's avoided-cost determinations have determinative force in another State. Rather, PURPA expressly recognizes the traditional limitations on each State's regulatory authority to activities within the State. It is a long-settled principle that state authority to regulate retail transactions in the sale of electricity "is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1982).

Against that backdrop, any congressional grant of authority to one State to preempt important aspects of retail ratemaking in another State must be clear. PURPA Section 210(f)(1), however, expressly confines a State's powers in implementing PURPA to those utilities over which "it has ratemaking authority." 16 U.S.C. 824a-3(f)(1). An individual State's "ratemaking authority" over a multistate utility is confined to the utility's operations within that State. The statutory text shows that Congress intended a state commission's actions under PURPA to control only the operations of utilities within its own borders. The text thus cuts against petitioner's assertion that the VSCC's avoided-cost determination controls the NCUC's decision making.

The conclusion that Congress did not intend to grant States preemptive authority in other States is reinforced by PURPA's express preemption provision, Section 210(e), 16 U.S.C. 824a-3(e), which authorizes FERC alone—and not individual States—to exempt qualified power facilities from "State laws and regulations." This Court has described that provision as preempting conflicting state law "in the traditional way." *FERC* v. *Mississippi*, 456 U.S. at 759. The existence of an express preemption provision granting preemptive authority exclusively to FERC undermines petitioner's contention that Congress in PURPA also intended implicitly to take the unprecedented step of vesting one State with federal preemptive power over its neighboring States.

PURPA's overall structure and purpose further reinforce the thrust of the plain language. PURPA's unique system of cooperative federalism—setting only broad federal parameters and leaving implementation largely to the separate regulatory and adjudicative processes of each State—contemplates a certain amount of disuniformity and experimentation from State to State.

Indeed, in its administration of PURPA, FERC has consistently afforded broad discretion to the States, recognizing that "economic and regulatory circumstances vary from State to State and utility to utility." 45 Fed. Reg. 12,231 (1980).

There is no basis to petitioner's assertion (Pet. 19-28) that the decision in this case is contrary to *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986). Those cases involved not state determinations under PURPA, but federal determinations by FERC under the Federal Power Act (FPA), 16 U.S.C. 791a *et seq*. The FPA, unlike PURPA, does not rely upon state implementation and does not contemplate disuniformity among the States with respect to determinations under federal law. *Mississippi Power & Light* involved sales of electric power made pursuant to interaffiliate wholesale contracts among producing and operating subsidiaries of a multistate public utility holding company. Those sales were subject to FERC's jurisdiction under the FPA. Similarly, *Nantahala* involved purchases of wholesale power by affiliated utilities under contracts subject to FERC's FPA jurisdiction. Both cases recognized that FERC's exclusive authority over wholesale energy sales would be undermined if state retail rate decisions could effectively change the rates FERC set. Here, by contrast, it is the States' authority to implement PURPA, not the authority of FERC under the FPA, that is at issue.[6]

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[6] Amicus Edison Electric Institute's reliance (EEI Br. at 6) on *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1987), for the proposition that Congress has implicitly delegated preemptive federal authority to States in other contexts is misplaced. The Court held in *City of Milwaukee* v. *Illinois* that the complaining downstream State lacked a federal common-law remedy to challenge a "source" State's implemen-

PURPA's statutory and regulatory structure does not appear to have created any significant problems for multi-state utilities. Such utilities can avoid incurring costs that they cannot fully pass on by obtaining prior approval of wholesale prices from each jurisdiction in which power purchased from a QF will be sold. Moreover, recent increased reliance on competitive rather than administrative methods for setting avoided costs, see 58 Fed. Reg. 51,777, 51,778 (1993), promises greater State-by-State uniformity in pricing and thus decreases the likelihood that the problem petitioner identifies will recur.[7]

Finally, there is no conflict among the courts of appeals or state courts of last resort on the issue in this case. Indeed, similar problems do not appear to have arisen elsewhere. Petitioner cites no case raising this issue before any state commission or federal or state court. In these circumstances, this Court's review is unwarranted.

2. This case is, in any event, an inappropriate vehicle for resolution of the questions petitioner presents. Petitioner's theory turns on its assertions that the VSCC rate determination was based exclusively on federal law. It appears, however, that the VSCC may have based its decision in part on state law.

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tation of federal pollution standards because federal legislation provided an administrative remedy, which the downstream State failed to pursue. *Id.* at 326. As the Court explained in subsequent cases addressing disputes between source States and downstream States, see *Arkansas* v. *Oklahoma*, 503 U.S. 91, 102 (1992), and *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-491 (1987), downstream States do not have authority to block permits issued by upstream States; rather, the affected downstream States' recourse is to the EPA.

[7] We agree with the NCUC (NCUC Public Staff Br. in Opp. 26-28) that no economic protectionism in violation of the Commerce Clause is implicated by the NCUC decision in this case.

At the time of the arbitration, FERC had not expressly clarified whether States, under the authority of their own laws, could require wholesale purchases from QFs at prices exceeding the federal avoided-cost ceiling. See 45 Fed. Reg. 12,214, 12,221 (1980); *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, reconsid. denied, 71 F.E.R.C. ¶ 61,035 (1995), appeal pending *sub nom. Niagara Mohawk Power Corp.* v. *FERC*, Nos. 95-1222 & 95-1223 (D.C. Cir. filed Apr. 21, 1995). At that time, Virginia had a state policy of encouraging favorable consideration of local economic benefits resulting from particular QF projects, see Pet. App. 33a, 63a, and the VSCC arbitrator appears to have taken into account the asserted benefits to Virginia from requiring petitioner to contract with Ultra Cogen, *id.* at 68a. As the NCUC noted, if petitioner was required to pay a premium in order to produce economic benefits for the Commonwealth of Virginia, North Carolina ratepayers should not be required to subsidize those benefits. *Id.* at 74a.[8]

To the extent that the Virginia arbitrator's decision may be ambiguous as to whether it actually exceeds PURPA's avoided-cost ceiling (based on state law) or whether it depends solely on federal law, that ambiguity might have been eliminated by the Virginia Supreme Court if petitioner had pursued an appeal of the VSCC's order adopting the arbitrator's determination. Indeed, even if the arbitrator intended to rely exclusively on federal law and to comply with PURPA's avoided-cost ceiling, the prices the arbitrator ordered for the Ultra Cogen contracts appeared even to Virginia Power to be far out of line with contemporaneous PURPA prices for purchases from QFs. An appeal might have identified

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[8] Even now, petitioner may be able to seek authority from the VSCC to recover the additional cost from Virginia ratepayers.

errors in the arbitrator's methodology and thereby ameliorated or cured the problem petitioner now faces.[9] Moreover, if petitioner had promptly notified the NCUC of the Ultra Cogen contracts, as it was required to do under the NCUC's 1987 order, see Pet. App. 35a-36a, 60a-61a, the NCUC could have intervened in such an appeal and sought clarification of the impact that local factors had on the VSCC's pricing decision or correction of the methodology upon which the arbitrator relied. In the absence of any such opportunity, the decision of the North Carolina Supreme Court declining to require the NCUC to pass on some of the Ultra Cogen costs to North Carolina ratepayers does not warrant further review.[10]

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[9] We take no position on the question of what is the correct avoided-cost figure for the Ultra Cogen contracts, nor, contrary to petitioner's suggestion (Pet. 23 n.32) has FERC taken any position on the question in any of its rulings.

[10] Amicus EEI makes the misdirected suggestion (Amicus Br. 9-10) that the NCUC erred procedurally in this case by not requiring petitioner to request that FERC, under PURPA Section 210(h)(2), 16 U.S.C. 824a-3(h)(2), challenge the VSCC's avoided-cost decision (and require petitioner to sue in its own right if FERC declined to do so), and thereby create an opportunity for the NCUC to intervene to protect its interests. It was petitioner, not the NCUC, that omitted needed procedural steps. Petitioner's failure to notify the NCUC of the Virginia arbitration, and its failure to appeal the VSCC's decision, eliminated any opportunity for the NCUC to intervene or otherwise make its interests known, and perhaps to work out a resolution satisfactory to all interested parties, before the VSCC's decision became final and unappealable under applicable state procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1996